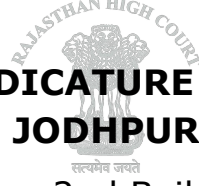




**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**



S.B. Criminal Miscellaneous 2nd Bail Application No. 238/2024

Sunil S/o Shri Jeta Ram, Aged About 37 Years, R/o Village Finch,
Luni P.s., Dist. Jodhpur, At Present Guro Ka Talab, Pratap Nagar,
P.s. Pratapnagar, Jodhpur, Dist. Jodhpur Metro. (Lodged In Sub
Jail, Suratgarh).

----Petitioner

Versus

State Of Rajasthan, Through Pp

----Respondent

Connected With

S.B. Criminal Miscellaneous Bail Application No. 15746/2023

Sunny Sharma

----Petitioner

Versus

1 State Of Rajasthan, Through Pp

2 Satyanarayan Godara

.

----Respondents

S.B. Criminal Miscellaneous Bail Application No. 16263/2023

Prakash

----Petitioner

Versus

State Of Rajasthan, Through Pp

----Respondent

For Petitioner(s) : Mr. Ashok Khilery
Mr. Rajendra Singh Rathore
Mr. Vinod Kumar Sharma
Mr. Dilip Kumar Sharma
For Respondent(s) : Mr. Mukhtiyar Khan, PP

**HON'BLE MR. JUSTICE FARJAND ALI****Order****ORDER RESERVED ON :::: 02/02/2024****ORDER PRONOUNCED ON :::: 04/04/2024**

1. The jurisdiction of this court has been invoked by way of filing these instant bail applications under Section 439 CrPC at the instance of accused-petitioners. The requisite details of the matter are tabulated herein below:

S.No.	Particulars of the Case	
1.	FIR Number	323/2022
2.	Concerned Police Station	Rajiyasar
3.	District	Ganganagar
4.	Offences alleged in the FIR	Sections 8/15 & 29 of the NDPS Act
5.	Offences added, if any	-
6.(A)	Date of passing of impugned order (SBCRLM2ndB No.238/2024)	16.12.2023
6.(B)	Date of passing of impugned order (SBCRLMB No.16263/2023)	04.07.2023
6.(c)	Date of passing of impugned order (SBCRLMB No.15746/2023)	03.11.2023

2. All these three bail applications have arisen out of the FIR No.323/2022 registered at the Police Station Rajiyasar, District Ganganagar. Thus, are being decided by this common order.

3. Vide order dated 29.08.2023, the first bail application (SBCRLMB No.9198/2023) filed on behalf of the petitioner Sunil came to be dismissed as withdrawn but a liberty was given to him to renew his prayer for bail after the statement of Investigating





Officer is recorded. Now, the statement of Investigating Officer is recorded, hence the instant bail application.

4. Bereft of elaborate details, briefly stated the facts are that on 20.12.2022, the police team of Police Station Rajiyasar intercepted two vehicles i.e. SWIFT Car and a BOLERO Pickup. The Bolero pickup was being driven by the accused Sunil and the accused Sunny Sharma @ Sanju was sitting by his side. The driver of the Car was Prakash and the another persons sitting in the car were Bhupendra and Bablu. It is alleged that 76 Kg poppy husk came to be recovered from these vehicles and all three petitioners namely Sunil, Sunny Sharma @ Sanju and Prakash were arrested for the accusation of having contraband with them without having any license. The incident said to have taken place on 20.12.2022 at around 11:00 a.m. near Vijaynagar-Hindol Toll Plaza, Rajiyasar. Hence, these bail applications.

5. It is contended on behalf of the accused-petitioners that no case for the alleged offences is made out against them and their incarceration is not warranted. There are no factors at play in the case at hand that may work against grant of bail to the accused-petitioners and they have been made an accused based on conjectures and surmises.

6. Contrary to the submissions of learned counsel for the petitioner, learned Public Prosecutor opposes the bail application and submits that the present case is not fit for enlargement of accused on bail.

7. Have considered the submissions made by both the parties and perused the copies of the challan papers attached with the



report under Section 173 Cr.P.C. as well as the other material provided on behalf of the accused particularly the orders dated 08.05.2023 and 19.06.2023 passed by the learned Additional Sessions Judge, Suratgarh in respect of an application under Section 91 of the Cr.P.C.

8. A plea was raised on behalf of the defence that a false case has been foisted against the petitioners and no recovery as alleged was effected from them. It has been pleaded that the petitioners are innocent persons and recovery in this case has been planted by the Seizing Officer. For the purpose of proving their defence, an application dated 20.02.2023 under Section 91 of the Cr.P.C. came to be submitted on their behalf with a prayer to procure footage of CCTV cameras installed at the Hindol Toll Plaza, Rajiyasar to know whether the alleged incident took place or not. It was prayed in the application that if the footage of CCTV Cameras of the crime scene would be called and examined by the Court then it shall be manifested that no incident as alleged in the charge sheet had happened at that particular point of time. Upon hearing on the application, the learned trial Court vide order dated 09.02.2023 had passed an order by directing the State/Toll Plaza to procure the CCTV footage of Hindol Toll Plaza between 8:45 am to 1:00 p.m. on 20.12.2022. In a flagrant disregard of the order, no compliance was made either by the State or by the Toll authorities. Again an application was moved for initiation of proceeding for contumacious act of the State and the toll authorities but the learned trial Judge rejected the same vide order dated 08.05.2023 on technical grounds. Another application



dated 29.05.2023 under Section 91 Cr.P.C. got filed at the instance of the defence with a specific prayer that for the purpose of elucidation of the fact and to illicit the truth further order may be passed for providing mobile call data records and tower location of Seizing Officer Satya Narayan Godara and the accused persons. The said application got rejected on 19.06.2023 and by doing so, the petitioners have been deprived to prove their innocence. In other words, it can be said that the opportunity to disprove the allegations or to defend themselves has not been afforded to them rather they have been precluded since the above referred piece of evidence was beyond the control and power of the accused so as to be produced during trial.

9. As per the regulation of the TRAI (Telecom Regulatory Authority of India), the details of tower location and call data record get deleted automatically after expiry of one year. Similarly, the storage of DVR shall also be deleted or might have been deleted till now by the Toll authorities.

10. Though, in all criminal proceedings, the burden always lies upon the prosecution to prove its case that too, beyond every shadow of reasonable doubt but here in the present case, even the defence is claiming that they have not committed the alleged offence and they wanted to place on record the proof of their innocence as well as the proof regarding forcing them to face trial of a false case, but to the utter dismay, even the Court of law has not paid heed to provide them the legal opportunity, on the contrary, allowed the prosecution to destroy the defence evidence. In ordinary course of nature, when an accused takes a risk by



making prayer of production of certain piece of evidence on record; presence of which may at one hand prove the defence theory or on the other hand corroborate the stand of the prosecution; in that circumstance, the Court should lean to order regarding production of document so that truth and falsehood may be separated and Court would know the verity. When it is the case of the prosecution that the incident took place at a particular time and place and neither it is refuted nor denied that CCTV footage of the cameras were not installed at that particular place then despite making a prayer, not passing direction for production of the evidence would tantamounts to an utter disregard of the principle of law and justice. It would mean that the State or even the Courts are not keen to ensure fair play and want to see that the goal of justice be defeated.

11. It is the rule of Criminal Jurisprudence and of common prudence as well that the best evidence should have been produced, if available. Here, in this case, besides the simple assertion and oral allegation, a possibility has been shown regarding capturing of crime scene and the entire proceeding undertaken there on spot than in ordinary course of nature it was imperative upon the prosecution to produce the same so as to thwart all possibility of reasonable doubt.

12. Viewing the matter from another angle, if an order has been passed by a Court of competent jurisdiction for providing/ storing the particular datas of CCTV footage then it was incumbent rather the State authorities and the toll authorities were obligated to provide the same to the Court so that whatever wrong will be





proved to be wrong and vice versa in the end. It would mean "Sifting of just from unjust". Providing the CCTV footage, Call data record and mobile tower location would make everything crystal clear whether the defence theory is correct or whether the case of the prosecution is genuine since the producer of the evidence is a third central party. It is not comprehensible for this Court that when a prayer is made to make the things crystal clear then why the State trying hard to or even defying the Court order so as to hid the truth or to obstruct the way of reaching onto the real facts. The conduct of the investigating agency in this matter creating a serious doubt on the genuineness of the story set out in the seizure memo. It seems that the documents in the form of electronic record has deliberately been withheld because the Agency might have thought that production of the same may belie their story. All these facts and circumstances persuading this Court to tentatively infer that the story narrated in the "Parcha Kayami" and seizure memo and lastly in the charge sheet is nothing but a cooked up story and the witnesses are "taylor made". it is not understandable that what was the fear for the prosecution agency to conceal the documents; production of which would speak about the truth? It seems that 'there is specks in beard of a thief'; and strong circumstances are there to believe that the prosecution agency does not want to bring forth the truth before the Court and wanted to keep away the same so as to suppress the actual facts from disclosure. A Court of law can take judicial note of certain things and it cannot be kept in dark or in





oblivion nor the Court is expected to sway in the flow of story set out by the prosecution in the charge sheet.

13. There are certain presumption clauses in the Indian Evidence Act and as per which, a Court of law can presume existence of certain facts which may happen or likely to have happened.

Section 114 of the Indian Evidence Act reads as under:-

Section 114 of the Evidence Act:

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume --

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

As envisaged under illustration (g) of Section 114 of the Evidence Act, as on date it can be presumed that the evidence with regard to CCTV footage of the toll plaza and the call data record/ tower location of the Seizing Officer could have been produced by the prosecution but not produced deliberately rather withheld despite the order of the Court and as such, it can further be believed that if the above evidence would have been produced on record then the same would be unfavorable to the prosecution agency. A serious dent has indeed been put on the genesis and genuineness of the story set out by the prosecution in the charge sheet. The accused are languishing in jail. They are crying for





justice and seeking help of the Court of law to provide assistance to explain them that they are innocent. At this juncture, this Court feels that non-production of material even after passing of the order of the trial Court amounts to contempt of the order of the trial Court which has never been purged rather the order has been defied brazenly.

14. When the question comes to the liberty of an individual which is otherwise guaranteed by the Constitution, this Court being Constitutional Court, is supposed to and expected to protect the fundamental right of an accused. Article 21 of the Constitution Of India provides that "*no person shall be deprived of his life or personal liberty except according to the procedure established by law*" This fundamental right is available to every person, be as a citizen or a foreigner. Needless to say that it is available to an accused also. Hon'ble the Supreme Court in the case of **Maneka Gandhi Vs. Union of India (UOI) & Ors** reported in AIR 1978 SC 597 has emphasized that the procedure established by law must be fair, just and reasonable and it cannot be arbitrary, oppressive or unreasonable. Here, in this case grave and serious questions have been raised over the fairness of the seizure memo.

15. Now coming back to the niceties of the matters. Besides the falsity of allegations; serious question of non-compliance of Sections 42 & 52-A of the NDPS Act have been raised. The samples which were taken at the spot from the alleged recovered contraband were marked as A,B,C & D and the same were sent to the FSL for detection of Morphine or its derivative. Admittedly, no samples were collected or sent in the presence of the Magistrate



after making inventory before him. In a recent judgment titled as Mohammed Khalid and another Vs. The State of Telangana passed by Hon'ble the Supreme Court in Criminal Appeal No(S). 1610 Of 2023 dated 01.03.2024, it was held that since no proceedings were undertaken for preparing of inventory and drawings of samples as per Section 52-A of NDPS Act, thus, the FSL was considered to be waste and was not considered worthy of being read in evidence on the basis of this inter alia other aspects, Hon'ble the Apex Court acquitted the appellants of all charges. The relevant paragraph of the above judgment is reproduced as under:-

“22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence.”

16. In this instant matter too, the alleged contraband was seized on 22.12.2022 and no inventory as provided under Section 52-A of NDPS Act was prepared after the seizure of the contraband and no samples drawn in the presence of magistrate were sent for scientific investigation, thus, the requisite compliance of Section 52-A of NDPS Act has not been made.

17. This Court is cognizant of the provisions contained in Section 37 of the NDPS Act but considering the submissions made by learned counsel for the accused-petitioners regarding non-compliance of statutory procedure, as well as the other circumstances regarding withholding of material evidence; this





court is of the opinion that it is a fit case for grant of bail to the accused petitioners.

18. Accordingly, the instant bail applications under Section 439 Cr.P.C. are allowed and it is ordered that the accused-petitioners shall be enlarged on bail provided each of them furnishes a personal bond in the sum of Rs.50,000/- with two sureties of Rs.25,000/- each to the satisfaction of the learned trial Judge for their appearance before the court concerned on all the dates of hearing as and when called upon to do so.

19. Before parting, it is made clear that the observation made hereinabove are limited for the purpose of justifiable disposal of the instant bail applications and the trial Court shall not be influenced from it at any stage of the proceedings.

(FARJAND ALI),J

21-Mamta/-